

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JON M. McCREARY, individually and ) Case No. 11-1618 SC  
on behalf of all others similarly )  
situated, ) ORDER DENYING MOTION TO  
Plaintiff, ) SHORTEN TIME AND STAYING  
v. ) CASE  
CELERA CORPORATION, KATHY P. )  
ORDONEZ, WILLIAM G. GREEN, RICHARD )  
H. AYERS, JEAN-LUC BELINGRAD, GAIL )  
K. NAUGHTON, WAYNE I. ROE, PETER )  
BARTON HUTT, BENNETT M. SHAPIRO, )  
QUEST DIAGNOSTICS CORPORATION; and )  
SPARK ACQUISITION CORPORATION, )  
Defendants. )

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**I. INTRODUCTION**

Before the Court is a Motion to Shorten Time on Pending Motion for Expedited Discovery and Preliminary Injunction filed by Plaintiff Jon McCreary ("Plaintiff") against Defendants Celera, Corp., et al. ("Defendants"). ECF No. 11 ("Mot."). Defendants filed an Opposition. ECF No. 15. The Court, having considered the papers and pleadings on file, hereby DENIES the Motion. Furthermore, the Court STAYS the instant case pending the outcome of proceedings before the Delaware Court of Chancery in a nearly identical action.

1       **II. BACKGROUND**

2           On March 18, 2011, Celera Corporation ("Celera") and Quest  
3 Diagnostics, Inc. ("Quest") announced they had entered into a  
4 merger agreement pursuant to which Quest would commence a tender  
5 offer to purchase all outstanding shares of Celera common stock for  
6 \$8.00 per share in cash, to be followed by a "second-step merger"  
7 upon the expiration of the tender offer on April 25, 2011. ECF No.  
8 1 ("Compl.") ¶ 2.

9           On April 1, 2011, Plaintiff filed this action alleging that  
10 Defendants' actions relating to the proposed acquisition breached  
11 their fiduciary duties and violated the Securities Exchange Act of  
12 1934 ("Exchange Act"). See Id. In short, Plaintiff alleges that  
13 the proposed acquisition is an effort by members of the Celera  
14 Board of Directors (including the individual Defendants named  
15 herein) to insulate themselves from liability in pending accounting  
16 and securities fraud litigation against Celera. Id. ¶ 3.  
17 Plaintiff asserts breach of fiduciary duty claims on behalf of all  
18 public shareholders of Celera, and he asserts an individual claim  
19 for violations of the Exchange Act. Id. ¶ 1. Plaintiff alleges  
20 that, in executing the proposed acquisition, Defendants breached  
21 their fiduciary duty to employ a sales process designed to maximize  
22 the value of Celera common stock. Id. ¶ 77. Plaintiff further  
23 alleges that the "Recommendation Statement" soliciting shareholder  
24 approval for the proposed acquisition omits material facts in  
25 violation of Defendants' fiduciary duties and in violation of  
26 sections 14(d)(4) and 14(e) of the Exchange Act. Id. ¶¶ 72, 78.

27           Between March 18, 2011, when Quest and Celera first announced  
28 the proposed acquisition, and April 1, 2011, when Plaintiff filed

1 this lawsuit, seven other lawsuits seeking to enjoin the  
2 transaction were filed in three different jurisdictions. Opp'n at  
3 1; see also ECF No. 14 ("Notice of Pendency").

4 Three of these actions were filed in the Delaware Court of  
5 Chancery and have been consolidated under the caption In re Celera  
6 Corp. Shareholder Litigation, Consol. C.A. No. 6304-VCP. See  
7 Notice of Pendency, Ex. 1 ("Del. Consol. Compl."). Expedited  
8 discovery is underway in that litigation and will close on April  
9 13, 2011. Notice of Pendency, Ex. 5 ("Del. Case Scheduling  
10 Order"). On April 20, 2011, the Delaware Court of Chancery will  
11 hear the plaintiffs' motion for a preliminary injunction enjoining  
12 the proposed acquisition. Id.

13 In addition to the Delaware actions, three actions were filed  
14 in Alameda County Superior Court and were subsequently consolidated  
15 under the caption Lauver v. Ordonez, et al., RG11567227. Id., Exs.  
16 2-4 ("Alameda Super. Ct. Complaints").

17 The last of the seven actions attempting to challenge the  
18 proposed acquisition and predating Plaintiff's Complaint is pending  
19 in this District. In In re Celera Corp. Derivative Litigation, No.  
20 10-CV-02935-JW, plaintiffs moved on March 23, 2011 to amend their  
21 existing derivative claims to include additional class claims  
22 arising out of the proposed acquisition. See Notice of Pendency.  
23 Chief Judge Ware will hear the motion for leave to amend on April  
24 18, 2010. Id.

25 All of the eight actions, including Plaintiff's, make  
26 substantially identical allegations against the same defendants.  
27 Each alleges that Celera's directors breached their fiduciary  
28 duties by approving the proposed acquisition and made false or

1 misleading disclosures about the transaction. See Notice of  
2 Pendency, Exs. 1-4. Each action seeks to represent the same  
3 nationwide class of Celera stockholders. Id. Indeed, the only  
4 difference between Plaintiff's action and the others is that  
5 Plaintiff has added individual claims under the Exchange Act based  
6 on the same allegedly misleading disclosures that form part of the  
7 basis for his fiduciary duty claims.

8 On April 5, 2011, Plaintiff filed a Motion for Preliminary  
9 Injunction and Expedited Discovery. ECF No. 7 ("Mot. for  
10 Preliminary Injunction"). In his Motion for Preliminary  
11 Injunction, Plaintiff requests access to essentially the same  
12 documents that have been produced in connection with the Delaware  
13 litigation, as well as the opportunity to depose witnesses on short  
14 notice. Id. at 16. Plaintiff asks the Court to enjoin the  
15 proposed acquisition "until the Board properly shops [Celera]  
16 and/or at least ensures that shareholders have the information  
17 necessary to make a fully-informed decision with respect to any  
18 value-maximizing transaction." Id. at 2.

19 On April 6, 2011, Plaintiff filed the instant Motion to  
20 Shorten Time. Plaintiff seeks a hearing date at least ten days  
21 prior to the expiration of Celera's tender offer on April 25, 2011.  
22 The Motion for Preliminary Injunction is currently scheduled to be  
23 heard on May 27, 2011.

24

25 **III. DISCUSSION**

26 A. Plaintiff's Motion to Shorten Time

27 Plaintiff's Motion does not comply with the Civil Local Rules  
28 governing motions to enlarge or shorten time. Civil Local Rule 6-3

1 provides that a motion to shorten time must be accompanied by a  
2 declaration that (1) sets forth with particularity the reasons for  
3 the request; (2) describes the efforts the party has made to obtain  
4 a stipulation to the time change; (3) identifies the harm or  
5 prejudice that would occur if the Court did not change the time;  
6 (4) describes the moving party's compliance with Civil Local Rule  
7 37-1(a) where applicable; (5) describes the nature of the  
8 underlying dispute and summarizes the position of each party; (6)  
9 discloses all previous time modifications in the case; and (7)  
10 describes the effect the requested modification would have on the  
11 schedule for the case. Here, Plaintiff has not included a  
12 declaration in support of his Motion and has satisfied none of  
13 these requirements. Accordingly, the Court DENIES Plaintiff's  
14 Motion to Shorten Time.

15           B. Stay of this action pending the outcome of the Delaware  
16           proceedings

17       In its Notice of Pendency, Defendants submit that this action  
18 should be stayed pending the outcome of the Delaware action.  
19 Notice of Pendency at 3. This Court agrees. A district court has  
20 inherent power to stay proceedings and "to control the disposition  
21 of the causes on its docket with economy of time and effort for  
22 itself, for counsel, and for litigants." Landis v. North American  
23 Co., 299 U.S. 248, 254 (1936). "A trial court may, with propriety,  
24 find it is efficient for its own docket and the fairest course for  
25 the parties to enter a stay of an action before it, pending  
26 resolution of independent proceedings which bear upon the case."  
27 Leyva v. Cert. Grocers of Cal., 593 F.2d 857, 863-64 (9th Cir.  
28 1979).

Courts look to the Colorado River doctrine when determining whether to stay a federal action in light of a pending state action. Under the Colorado River doctrine, a federal court may abstain from exercising its jurisdiction in favor of parallel state proceedings where doing so would serve the interests of "[w]ise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). "Exact parallelism" between the state and federal actions is not required; it is enough if the two actions are "substantially similar." Nakash v. Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989). Nonetheless, the Ninth Circuit has emphasized that "the Colorado River doctrine is a narrow exception to 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" Holder v. Holder, 305 F.3d 854, 867 (9th Cir. 2002) (quoting Colorado River, 424 U.S. at 817). Accordingly, a stay of proceedings pursuant to the Colorado River doctrine is appropriate only where "exceptional circumstances" are present. Id.

If state and federal actions are parallel, then the Court must consider seven factors that, although not exclusive, are relevant to whether a stay is appropriate under Colorado River and its progeny: (1) whether the state court first assumed jurisdiction over property; (2) inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings are inadequate

1 to protect the federal litigant's rights; (7) whether exercising  
2 jurisdiction would promote forum shopping. Holder, 305 F.3d at  
3 870.

4       1. The instant action and the Delaware action are  
5                   parallel

6 Plaintiff has asserted state law claims for breach of  
7 fiduciary duty and aiding and abetting breach of fiduciary duty and  
8 has also asserted a claim under section 14(e) of the Exchange Act  
9 based on the same facts underlying his state law claims.<sup>1</sup> See  
10 Compl. Plaintiff's action is substantially similar to the Delaware  
11 action and therefore satisfies the "parallel proceedings"  
12 requirement of Colorado River. Both actions seek to represent the  
13 same class of Celera shareholders against exactly the same  
14 defendants. See Compl; Notice of Pendency, Ex. 1 ("Consol. Del.  
15 Compl."). Both allege that Celera's directors breached their  
16 fiduciary duties by approving the proposed acquisition and that all  
17 Defendants made false or misleading disclosures about the  
18 transaction in proxy statements filed with the Securities and  
19 Exchange Commission. Id. The primary relief sought in both  
20 actions is also substantially the same: an injunction enjoining the  
21 proposed acquisition until the Celera Board has complied with its  
22 fiduciary duties involving the transaction, and compensatory  
23 damages to class members. Id.

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26       <sup>1</sup> Plaintiff also purports to bring a Section 14(d)(4) claim, but  
27 that provision does not give rise to a private right of action.  
28 See, e.g., Erickson v. Wheatley Ventures, No. C-96 2934, 1997  
WL 119849, \*5 (N.D. Cal. Mar. 4, 1997); Washburn v. Madison Square  
Garden Corp., 340 F. Supp. 504, 508 (S.D.N.Y. 1972).

1           2. The Colorado River factors favor staying the instant  
2           proceedings

3           The first factor -- whether the Delaware court first assumed  
4 jurisdiction over property -- is not a consideration in this case.  
5 The second factor, inconvenience of the federal forum, does not  
6 weigh in favor or against granting a stay. Many of the Defendants  
7 are located in California, Plaintiff is a citizen of Nevada, and  
8 the corporate Defendants are incorporated in Delaware. Because  
9 Celera's headquarters is located in California, it is likely that  
10 many witnesses and documents are located in California. However,  
11 those witnesses and documents will have to be produced, and likely  
12 have already been produced, in connection with the Delaware  
13 litigation regardless of whether this Court stays Plaintiff's  
14 action. Accordingly, the convenience of the federal forum is a  
15 neutral factor in this case.

16           The third factor, avoiding piecemeal litigation, favors a stay  
17 when "different tribunals consider the same issue, thereby  
18 duplicating efforts and possibly reaching different results."  
19 Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1369 (9th Cir.  
20 1990). Permitting Plaintiff's claims to proceed in parallel with  
21 the Delaware action would waste significant judicial resources and  
22 create a serious risk of conflicting results that could impact  
23 thousands of shareholders.

24           The fourth factor -- the order in which the concurrent forums  
25 obtained jurisdiction -- also weighs heavily in favor of staying  
26 this case. The Delaware action commenced nearly two weeks prior to  
27 Plaintiff's action, expedited discovery in Delaware is nearly  
28 complete, and the Delaware court will hear the motion for

1 preliminary injunction one week from today. Del. Case Scheduling  
2 Order.

3 The fifth factor -- whether federal law or state law provides  
4 the rule of decision -- weighs in favor of staying the proceedings.  
5 Plaintiff's fiduciary duty claims will be governed by Delaware law  
6 because Celera, Quest, and Spark Acquisition Corporation are all  
7 Delaware corporations. Davis & Cox v. Summa Corp., 751 F.2d 1507,  
8 1527 (9th Cir. 1985) ("Claims involving 'internal affairs' of  
9 corporations, such as breach of fiduciary duties, are subject to  
10 the laws of the state of incorporation."). The unique expertise of  
11 the Delaware court in applying Delaware corporate law militates in  
12 favor of allowing the Delaware court to rule on those claims.

13 The Court takes note of the fact that Plaintiff's Exchange Act  
14 claim is subject to exclusive federal jurisdiction, and generally  
15 district courts may not invoke the Colorado River doctrine to stay  
16 such claims. See Intel Corp. v. Advanced Micro Devices, Inc., 12  
17 F.3d 908, 913 n.7 (9th Cir. 1993) ("[T]he circuit courts, and the  
18 Ninth Circuit in particular, have uniformly held that a district  
19 court may not grant a stay in [cases involving claims subject to  
20 exclusive federal jurisdiction]."). Here, however, Plaintiff's  
21 Exchange Act claim is duplicative of the Delaware plaintiffs' state  
22 law claims. Plaintiff's Exchange Act claim alleges that Defendants  
23 violated the Act by filing a Recommendation Statement with the SEC  
24 that omitted material facts and was "materially misleading."  
25 Compl. ¶ 72. Counts I and III of the Delaware plaintiffs'  
26 Consolidated Complaint allege that the same defendants breached  
27 their fiduciary duties by filing false and misleading proxy  
28 statements with the SEC. Del. Consol. Compl. ¶¶ 95, 104. Other

1 courts have found that abstention under Colorado River is  
2 appropriate in such circumstances. See International Jensen Inc.  
3 v. Emerson Radio Corp., No. 96-C-2816, 1996 U.S. Dist. LEXIS 12481,  
4 \*18 (N.D. Ill. Aug. 26, 1996) (staying a federal action where the  
5 plaintiff asserted Exchange Act claims that were duplicative of  
6 state law fiduciary duty claims in a parallel Delaware proceeding).  
7 In Jensen, the court found that a stay was warranted "because the  
8 relationship and nature of the exclusively federal claim and the  
9 state law claim are so decisively similar." Id. at \*11. The court  
10 noted that Delaware common law recognizes claims based on material  
11 omissions in proxies similar to the plaintiff's Exchange Act  
12 claims, and that Delaware courts apply the same standard for  
13 materiality as the Supreme Court has recognized for Exchange Act  
14 claims. Id. at \*12. Given the duplicative nature of Plaintiff's  
15 federal claim the Delaware plaintiffs' state law claims here, the  
16 Court finds that, as in Jensen, staying the proceedings is within  
17 the Court's discretion.<sup>2</sup> The fifth factor thus weighs in favor of  
18 staying Plaintiff's action.

19 Sixth, the adequacy of state court action to protect the  
20 federal plaintiff's rights does not weigh very heavily in either  
21 direction. As noted above, although the Delaware court cannot  
22 adjudicate Plaintiff's Exchange Act claim, the primary relief

23 <sup>2</sup> As in Jensen, Delaware common law recognizes claims identical to  
24 Plaintiff's Exchange Act claim here. A claim under section 14(e)  
25 of the Exchange Act requires a plaintiff to show that the defendant  
26 made materially false or misleading statements in connection with a  
27 tender offer. 15 U.S.C. § 78n(e). By comparison, Delaware state  
28 law requires that corporate board members disclose material  
information, provide a "truthful account of all matters," and  
"avoid misleading partial disclosures" in connection with a tender  
offer. In re Pure Res. S'Holders Litig., 808 A.2d 421, 447 (Del.  
Ch. 2002). The courts of Delaware apply the same standard of  
materiality that federal courts apply to Exchange Act claims. See  
Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985).

1 Plaintiff seeks -- an injunction against the merger and  
2 compensatory damages -- can be awarded by the Delaware court.  
3 Whether an injunction is granted or denied by this Court or by the  
4 Delaware Court is unimportant -- the effect of preventing or  
5 allowing the proposed acquisition to proceed is the same no matter  
6 which court takes action.

7 The seventh factor -- whether exercising jurisdiction would  
8 promote forum shopping -- weighs in favor of staying this action.  
9 The Ninth Circuit has indicated that "forum shopping weighs in  
10 favor of a stay when the party opposing the stay seeks to avoid  
11 adverse rulings made by the state court or to gain a tactical  
12 advantage from the application of federal court rules." Travelers,  
13 914 F.2d at 1369. Plaintiff filed this action after six nearly  
14 identical actions were filed in state courts. Plaintiff's claims  
15 differ from the other actions only by including an Exchange Act  
16 claim based on the same underlying facts as the fiduciary duty  
17 claims asserted by Plaintiff and by plaintiffs in the other  
18 actions. The Court is therefore wary of the likelihood that  
19 Plaintiff filed this action to "gain a tactical advantage from the  
20 application of federal court rules." Id. Accordingly, the seventh  
21 factor weighs in favor of staying Plaintiff's case.

22 Weighing the factors relevant to the instant case and  
23 subjecting them to "a flexible balancing test, in which one factor  
24 may be accorded substantially more weight than another depending on  
25 the circumstances of the case," Holder, 305 F.3d at 870-71, the  
26 Court concludes that a stay of Plaintiff's action is warranted. As  
27 discussed above, the claims raise heightened concerns about  
28 piecemeal litigation, fall within the Delaware court's unique

1 expertise in Delaware corporate law, and are virtually identical to  
2 the claims raised in the Delaware actions. The proposed Delaware  
3 class action is capable of fully protecting the rights of Plaintiff  
4 and the purported shareholder class, and the Delaware proceedings  
5 have already progressed to an advanced stage. Taken together,  
6 these facts present the "exceptional circumstances" required to  
7 support a stay under the Colorado River doctrine.

8

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court DENIES Plaintiff's  
11 Motion to Shorten Time and STAYS all proceedings in this case  
12 pending the outcome of the consolidated action In re Celera Corp.  
13 Shareholder Litigation, Consol. C.A. No. 6304-VCP currently pending  
14 before the Delaware Court of Chancery.

15 The parties shall appear as scheduled for a Case Management  
16 Conference on July 22, 2011, at 10:00 a.m. in Courtroom 1, on the  
17 17th floor, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco,  
18 California 94102. A joint case management statement should be  
19 filed no later than seven (7) days prior to the Case Management  
20 Conference.

21

22 IT IS SO ORDERED.

23

24 Dated: April 13, 2011

  
25 UNITED STATES DISTRICT JUDGE

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